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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-771

COLLECTOR OF REVENUE, STATE OF LOUISIANA,
Petitioner,

versus

CHICAGO BRIDGE & IRON COMPANY,
Respondent.

RESPONSE OF CHICAGO BRIDGE & IRON COMPANY IN OPPOSITION TO THE PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS OF THE COURTS BELOW

The opinion of the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, is annexed as Appendix "1" to the Petition of the Collector of Revenue, State of Louisiana.

The opinion of the Louisiana Court of Appeal for the First Circuit is reported at 303 So.2d 750.

The opinion of the Supreme Court of Louisiana is reported at 317 So.2d 605.

JURISDICTION

The constitutional and statutory premises upon which the Petitioner seeks to invoke this Court's jurisdiction are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Louisiana Sales and Use Tax Law (Louisiana Revised Statutes Title 47, Chapter 2) imposes a greater burden upon building contractors engaged in interstate commerce than it imposes on such contractors involved in intrastate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 3 (the Commerce Clause).

Louisiana Revised Statutes, Title 47, Chapter 2, Sections 301-318. These statutes are annexed as Appendix "5" to the petition of the Collector of Revenue.

STATEMENT OF THE CASE

This suit was originally filed in March, 1964, by Chicago Bridge & Iron Company against the Collector of Revenue, State of Louisiana (the "Collector") for a refund of use taxes paid under protest in accordance with Louisiana Tax refund procedures.

In August of 1967 the Collector filed a reconventional demand for additional use taxes claimed against respondent during the same audit period.

The case was tried in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, and judgment was entered by that court denying Respondent's refund claim and awarding the Petitioner the additional use taxes claimed in the reconventional demand.

The Louisiana Court of Appeal for the First Circuit affirmed the trial court's judgment as to the tax liability of the Respondent.

The Supreme Court of Louisiana issued writs of certiorari, mandamus and review to the Court of Appeal, reversed the judgment of the Court of Appeal, granted Respondent's refund claim and dismissed the Petitioner's claim for additional use taxes.

The issue at every stage of these proceedings was the validity and application of the Louisiana Use Tax to the Respondent's activities in Louisiana.

The activities of the Respondent in Louisiana were stipulated and may be summarized as follows:

Between December 1, 1955 and December 31, 1959, Chicago Bridge & Iron Company, a company in the business of engineering and constructing steel structures in all parts of the nation and in foreign countries, entered into contracts on a lump-sum basis with municipalities, oil companies and other corporations for the construction of improvements to real estate in Louisiana. The improvements consisted of extremely large liquid storage tanks, such as water towers constructed for municipalities and petroleum storage

tanks constructed for use in the petroleum industry in Louisiana.

Pursuant to written contracts with owners of realty, Respondent undertook in each case to engineer and design a custom-made structure to the landowner's specifications, and then furnished all materials for, and constructed the structures. Each structure constructed by Respondent was of special order and peculiarly adapted to the needs of Respondent's customers as to their use, size, shape, thickness, quality of materials, and accessories. Such specialization as to every contract required detailed engineering analysis and drawings by Respondent's engineers, which engineering data was often submitted to the landowners for their approval prior to the processing of the materials and its subsequent incorporation into structures at job sites in Louisiana. The duration of the engineering work varied from one week to several months, depending primarily on the complexity of the project.

The structures built by Respondent consisted primarily of steel plates, in rectangular form, approximately 8 feet in width, 20 feet long, and varying in thickness from a fraction of an inch to several inches. The plates were purchased by Respondent from suppliers located near Respondent's shops in Birmingham, Chicago, Houston and several other cities. The plates were then transported by common carrier at Respondent's expense to shops owned and operated by Respondent in the cities mentioned just above.

In the fabrication plants, the plates being of great weight, were transported about by large overhead cranes to various machinery therein and other assorted operations as a particular plate required depending on its use and position in the structure to be built. Generally included in those operations was "pickling" of the steel plates whereby they were immersed into concentrations of acid for removal of mill scale and other impurities. The fabricating operations varied in length of time depending on the size of the structure, its complexity, the shop's work schedule and the urgency of the need for the material at the job site, and usually required several weeks or more for completion.

After processing at Respondent's shop in accordance with the engineering data formulated for each project, the steel plates were located at the fabricating plants aboard common carriers, retained and paid for by Respondent and transported by those carriers to job sites in Louisiana for use by Respondent by incorporation into structures at job sites in Louisiana.

Upon arrival by common carrier at job sites in Louisiana, the steel plates were unloaded by skilled employees of Respondent, boilermakers by trade, using equipment owned by Respondent. The plates were fitted by such employees into their proper places to build the structures, and in doing so they used equipment such as derricks, caterpillar tractors with side booms, or truck or crawler cranes, or the like, which were owned by Respondent. The various parts of the structures thus erected and fitted into place were subsequently welded together by those employees who

were required to demonstrate their proficiency to Respondent as welders prior to working on the structures.

After the structure had been completely welded together they were painted according to the customers' specifications by Respondent employees or painting subcontractors. Prior to painting and after completion of all welding operations the structures were hydrostatically tested for structural integrity by filling them with water and by air pressuration depending on the type of structure. The quality of the weld seams in the structures was also determined by x-ray inspection by Respondent's employees.

A crew for the erection of a typical structure consisted of approximately 8 to 10 men; the crew's number increased with the size of the structure. The periods of time for erection of the structures varied from approximately six weeks to several months or more, depending on their size and complexity.

Based on the above facts, the Collector has asserted in this litigation that a use tax is due by Respondent based on the following elements:

(1) Price paid by Respondent to steel vendors for steel plates;

(2) Labor and shop overhead expenses to Respondent for shaping and drilling the steel plates in its shops located outside Louisiana; and

(3) Cost to Respondent of transporting the steel plates from its shops outside Louisiana to job sites in Louisiana.

The legal dispute on the merits of this case deals exclusively with the inclusion of elements (2) and (3). Respondent has always paid to the State of Louisiana a use tax based on Item (1), but it consistently resisted, on legal grounds the inclusion of Items (2) and (3) in the use tax base.

ARGUMENT

The Lousiana Supreme Court held that the applicable taxing statutes of Louisiana imposed a use tax on interstate contractors based upon all three elements of value listed above, but that the corresponding sales tax statutes applicable to intrastate contractors imposed a sales tax only on the purchase price of raw materials. The court found and held that a more onerous burden was placed on contractors operating in interstate commerce and that the use tax, insofar as it imposed a tax based upon the elements of offsite fabrication and transportation, was unenforceable.

The decision of the Supreme Court of Louisiana is clearly correct and petitioner has not raised any argument or pointed to any flaw whatsoever in the court's reasoning or authority on the constitutional issue involved.

The Petitioner would not, we take it, quarrel with the basic legal premise in *Halliburton Oil Well Cemen-*

ting Company v. Reily, 373 U.S. 64 (1963), that the Commerce Clause prohibits the imposition of a use tax burden on the taxpayer operating in interstate commerce more onerous than the corresponding sales tax burden imposed upon a similarly situated intrastate taxpayer. The thrust of Petitioner's present argument is that this Court decided *Halliburton* on a factually incorrect stipulation and that, the Louisiana Revenue Department, as a matter of its own internal policy, charged the higher amount of tax to all taxpayers.

The Supreme Court of Louisiana rejected the conclusion of the lower courts that the *Halliburton* stipulation was in error, but the decision of the court below is based upon interpretation of Louisiana statutory law that makes the factual accuracy of the Petitioner's collection practices in the 1950's completely immaterial. Under the statutory interpretation made by the Court below, the best that can be said of the Petitioner's argument is that he may have, in some instances, overcharged intrastate taxpayers.

In formulating the question to be decided on the issue of shop labor and overhead, the Louisiana Supreme Court said:

> "We must then determine from the record before us and the laws of the State of Louisiana whether or not during the audit period in question, in-state manufacturer-users were or were not required to pay sales or use tax upon labor and shop overhead incurred at their in-state plant.
>
> * * *

> "The narrow question we are here considering is whether under Louisiana law the in-state purchaser who, in performing his construction contracts, in part fabricates or manufactures off site at his in-state plant, is required to pay, in addition to the sales tax on the raw materials purchased in-state, a use tax on the labor and shop overhead which goes into fabrication of such equipment. In effect, has the Louisiana Legislature placed upon the cost of intra-state labor and shop overhead a use tax, in the nature of a value added tax?" 317 So.2d at 609-10.

The court applied the following rule of statutory interpretation:

> "The statute does not precisely describe any use or value added tax upon the cost of intra-state labor and shop overhead. Nor does it clearly preclude the imposition of such a tax. At best for the Collector it might be said that the statute in this respect is unclear, or imprecise.
>
> "The general rule is that where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is adopted." 317 So.2d at 610.

The court disagreed with the Collector's argument that the regulations and policies of the Collector of Revenue clarified and applied the use tax statute with uniformity, and added:

"In any event taxes are imposed by the Legislature, not by the Department of Revenue."

The court concluded as follows on the issue of offsite labor and shop overhead:

"We conclude that pertinent to this case the use tax did not bear against labor and shop overhead of the in-state manufacturer-user, just as was stipulated in Halliburton.

"R. S. 47:302, to the extent that it imposes a use tax complementing the sales tax, was designed to, and in fact did, impose a tax upon tangible personal property not purchased within the State but rather imported and used therein. Furthermore it does not place a use tax, or value added tax, upon the cost of intra-state labor and shop overhead.

"Finding that the use tax is imposed upon labor and shop overhead of the out of state manufacturer-user and that neither sales nor use tax is imposed upon the in-state manufacturer-user, we are constrained by the United States Supreme Court decision in *Halliburton*, to conclude that the Louisiana Use Tax as applied to labor and shop overhead of the out of state manufacturer-user is unconstitutional and therefore unenforceable, because violative of the commerce clause of the United States Constitution." 317 So.2d at 612.

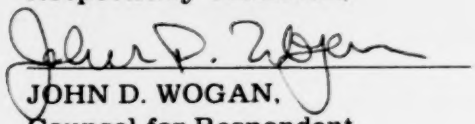
The issue of transportation costs was similarly disposed of:

> "Neither the sales nor use tax is imposed upon the in-state manufacturer-user for comparable transportation costs. R. S. 47:302(A)(1); 47:301(13)."
>
> * * *
>
> "We conclude that insofar as the use tax is imposed upon the element of transportation cost for shipping CBI's fabricated component parts from out of state plant to in-state job site, it is unconstitutional and unenforceable because in violation of the commerce clause of the United States Constitution." 317 So.2d at 615.

There is no substantial disagreement between the Petitioner and the Respondent as to the constitutional principles applicable to this case. A reading of Petitioner's supporting arguments makes it clear that he disagrees with the Louisiana Supreme Court's factual determinations and its interpretation of statutes enacted by the Louisiana legislature.

We submit that there is no misconstruction of federal constitutional law in the opinion or ruling of the state supreme court in this matter, and the petition of the Collector of Revenue for certiorari should be denied.

Respectfully submitted,



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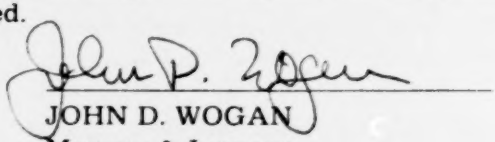
CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of February, 1976, three copies of the Response of Chicago Bridge & Iron Company in Opposition to the Petition for Certiorari to the Supreme Court of Louisiana were mailed, postage paid, to James A. Norris, Jr., Esq., counsel for the Collector of Revenue, State of Louisiana, 116 Slack Street, West Monroe, Louisiana 71291.

I further certify that all parties required to be served have been served.



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